No. 82-1006

Supreme Court, U.S.
FILED
JAN 21 1983
ALEXANDER L. STEVAS
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

VS.

LOCKHEED MISSILES & SPACE COMPANY, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Did an employer violate Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, by providing its employees with a health insurance plan which covered dependents but excluded coverage for pregnancies of dependents?

PARTIES

Petitioner, Equal Employment Opportunity Commission, and Respondent, Lockheed Missiles & Space Company, Inc., were the only parties to the proceedings before the United States Court of Appeals for the Ninth Circuit*. Lockheed Missiles & Space Company, Inc., a corporation, is a wholly-owned subsidiary of Lockheed Corporation.

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*The Equal Employment Advisory Council also participated in the Ninth Circuit proceedings as *Amici Curiae* urging affirmance of the decision of the district court.

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BRIEF FOR THE RESPONDENT

Petitioner has prayed that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. Petitioner has also requested that the petition for a writ of certiorari be held pending this Court's decision in *Newport News Shipbuilding & Drydock Co. v. EEOC*, *cert. granted*, No. 82-411 (December 6, 1982) because of the similarity of issues involved in these two cases. Respondent recognizes that the conflict between the Fourth and Ninth Circuit Courts of Appeals warrants holding this case pending the outcome of *Newport News*. Respondent urges, however, that the decision below of the Ninth Circuit is correct. Thus, the Court should reverse the decision of the Fourth Circuit in *Newport News* and thereafter deny the petition for writ of certiorari in the instant case.

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. App. A, 1a-9a) is reported at 680 F.2d 1243. The orders of the district court (Pet. App. B & C, 10a-13a) are not reported.

JURISDICTION

The judgment of the Ninth Circuit (Pet. App. D, 14a) was entered on July 6, 1982, and a petition for rehearing (Pet. App. E, 15a) was denied on September 27, 1982. The Court has jurisdiction to review this matter under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Statutes, regulations, and guidelines of the Equal Employment Opportunity Commission ("EEOC") involved in this matter are set forth in the petition at pages 2 through 4.

STATEMENT OF THE CASE

This lawsuit challenges one of Respondent's employee health insurance programs, the Lockheed Medical Benefit Plan (hereinafter "the Plan"), because formerly it generally covered medical conditions of dependents, but excluded coverage for most expenses for pregnancies of dependents.[1] Petitioner contends that the exclusion of pregnancy coverage for dependents discriminated against

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[1] Respondent has always provided one or more other employee health insurance programs at no cost to its employees which covered pregnancies of dependents. The challenged health plan also provided coverage for dependent spouses for complications of pregnancy resulting in intra-abdominal surgery. Respondent has provided coverage for spousal pregnancy under all employee health insurance programs since December 1, 1980.

Respondent's male employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (October 31, 1976) (hereinafter "PDA"), by denying such employees coverage for their spouses' pregnancies while generally covering medical conditions of the spouses of female employees. The validity of Petitioner's theory is presently at issue before this Court in *Newport News Shipbuilding & Dry Dock Co. v. EEOC, cert. granted,* No. 82-411.

In the instant case, the district court granted Respondent's motion for summary judgment relying on the reasoning of the district court in *Newport News Shipbuildng & Dry Dock Co. v. EEOC,* 510 F. Supp. 66 (E.D. Va. 1981), *reversed* 667 F.2d 448 (1981), *cert. granted,* No. 82-411 (December 6, 1982).

The district court in *Newport News* had held that an analogous employee health benefit program was not discriminatory on its face and that, there was no showing that the plan, by limiting reimbursement for the pregnancy-related expenses of spouses of male employees, had caused any gender-based effect in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). 510 F. Supp. at 71. In reaching this conclusion, the district court found that the PDA changed the law under Title VII, as interpreted in this Court's decision in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), only with respect to female employees. Thus, the district court held that *Gilbert* still applied to the issue of dependent's benefits.

The district court in the instant case denied Petitioner's motion for reconsideration and, in the process, reiterated its view that the PDA does not apply to dependents. (Pet. App. C, 13a).

The Court of Appeals for the Ninth Circuit affirmed unanimously. In so ruling, the Ninth Circuit held that the "PDA did no more than provide that an exception to Title VII's basic principles was to apply in the case of women employees," and, thus, that the basic principles of *Gilbert* survived the PDA to control the question of dependent's pregnancy benefits. 680 F.2d at 1246.[2] In support, the Ninth Circuit noted that the first clause of the PDA, Section 701(k) of Title VII, 42 U.S.C. § 2000e(k), is simply definitional; alone, it does not prohibit anything. Rather, it provides that the word "sex" in the prohibitory sections of Title VII is to be read to mean "pregnancy, childbirth or related medical conditions." When read with § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), the applicable prohibitory section of Title VII, it can be observed that the first clause of the PDA only applies to female employees. "§ 703(a)(1) now provides that it shall be an unlawful employment practice for an employer to 'discriminate against any individual with respect to his compensation . . . because of *such individuals*' . . . pregnancy, childbirth or related medical conditions." 680 F.2d at 1245 (emphasis in original).

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[2]While Judge Wright agreed with the majority's holding that the PDA does not apply to spousal benefits, he concurred specially on the ground that Respondent's health plan involved no unequal treatment or discrimination because it denied pregnancy benefits to dependents of both male and female employees. 680 F.2d at 1247 (Wright, J., specially concurring).

The Ninth Circuit also noted that the "second clause [of § 701(k)] in its reference to women employees ('employment-related purposes'; 'other persons not so affected but similar in their ability or inability to work') clarifies Congressional intent by restating the substance of the first clause in other than definitional terms, and making it clear that its limitation to employees was not inadvertent." 680 F.2d at 1245.

Finally, the court observed that the legislative history further supports a construction of the statute limiting its application to female employees. Specifically, the court quoted from the Senate Committee Report which made

> clear that in enacting PDA, Congress had in mind the fact that a question was presented as to dependents' benefits and deliberately chose not to deal with it. The Senate Report explicitly states that the basic purpose of the legislation was to protect women employees; that Congress did not regard the bill as altering the basic principles of Title VII respecting sexual discrimination and intended that those unaltered basic principles would apply in determining dependents' benefits.

680 F.2d at 1246. The applicable "basic principles" were those announced in *Gilbert*, and under *Gilbert* the "exclusion of pregnancy-related medical expenses of spouses of male employees was not gender-based discrimination in violation of § 703(a) of Title VII." 680 F.2d at 1247.

Petitioner's motion for rehearing was denied and its suggestion for a rehearing en banc was rejected by order dated September 27, 1982. (Pet. App. E, 15a).

ARGUMENT

Petitioner correctly asserts that the decision below is in conflict with the decision of the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co. v. EEOC, supra,* 667 F.2d 448, *cert. granted,* No. 82-411. For the reasons offered by the Ninth Circuit and set forth in the Petition for a Writ of Certiorari by Newport News Shipbuilding & Dry Dock Company, Respondent believes that the Ninth Circuit correctly decided the instant case.

The PDA does not apply by its terms or by Congressional intent to dependent's benefits. The definitional first clause of § 701(k) read against § 703(a)(1) cannot apply to male employees since § 703(a)(1) as defined by § 701(k) can only protect employees who have the capacity to become pregnant. The second clause of § 701(k) with its references to "employment-related purposes" and "ability or inability to work" necessarily contemplates that the pregnant person afforded protection thereunder is an employee.

The legislative history of the PDA confirms that it does not apply to dependent's benefits. As the Ninth Circuit noted, the Senate was conscious of the question of dependents' benefits and concluded that it would be answered on the basis of Title VII principles apart from the PDA.[3]

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[3]The Senate Report stated:

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that ***the basic purpose of this bill is to protect women employees,*** it does not alter the basic principles of Title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for Title VII purposes. Therefore, ***the question in regard to dependent's benefits would be determined on the basis of existing Title VII principles.***

While the Ninth Circuit found it unnecessary to search further for indicia of Congressional intent, it should also be noted that Senator Harrison Williams, chief sponsor and spokesperson for the PDA in the Senate, in a dialogue on the Senate floor with Senator Hatch, expressly stated that the PDA did not cover dependents.[4] Senator Williams'

S. Rep. No. 95-331, 95th Cong., 1st Sess. (July 6, 1977), 5-6, *reprinted in* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978* (hereinafter *"Legislative History"*), 42-43 (emphasis added).

The EEOC, in the introduction to its guidelines on the PDA, paraphrased the Senate Report:

> To the extent that a specific question is not directly answered by a reading of the Pregnancy Discrimination Act, existing principles of Title VII must be applied to resolve that question. The legislative history of the Pregnancy Discrimination Act states explicitly that existing principles of Title VII law would have to be applied to resolve this question of benefits for dependents. (S. Rep. No. 91-331 at 6.)

Final Interpretative Guidelines to the Pregnancy Discrimination Act of 1978, 44 Fed. Reg. 23804 (April 20, 1979). The EEOC has, of course, entirely reversed its position on the applicability of the PDA to the issue of dependents' pregnancy benefits and on the meaning of the legislative history of the PDA.

[4]Mr. HATCH: *The phrase "women affected by pregnancy, childbirth or related medical conditions," . . . appears to be overly broad,* and is not limited in terms of employment. It does not require that the person so affected be pregnant.

Indeed, under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment. One might even argue that other female dependents are covered. And what about the status of a woman coworker who is not pregnant but rides with a pregnant woman and cannot get to work once the pregnant female commences her maternity leave or the employed mother who stays home to nurse her pregnant daughter? Are they women "affected by" pregnancy?

Could the sponsors clarify exactly whom that phrase intends to cover?

other legislative comments on the PDA, as well as the statements of other legislators make clear the limited purpose of the PDA to protect female employees, not spouses or other dependents.[5]

Mr. WILLIAMS: If there is an ambiguity, with regard to income maintenance plans, I cannot see it. ". . . shall be treated the same for all employment-related purposes." I do not see how one can read into this any pregnancy other than that pregnancy that relates to the employee, and *if there is any ambiguity, let it be clear here and now that this is very precise. It deals with a woman, a woman who is an employee,* an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; that her particular period of disability, when she cannot work because of childbirth or anything related to childbirth is excluded. It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee.

Mr. HATCH: OK; or the effects on other people as a result of the pregnancy of a female employee.

Mr. WILLIAMS: Exactly. It does not.

123 Cong. Rec. S15,038-39 (1977) (remarks of Sen. Williams and Sen. Hatch) (Legislative History 80) (emphasis added).

[5]Thus, Senator Williams said upon introducing the PDA, "*[W]orking women* throughout our Nation from varied walks of life are in need of relief." 123 Cong. Rec. S4-142-43 (1977) (remarks of Sen. Williams) (Legislative History 4) (emphasis added.) During the final floor debate he declared:

> The central purpose of the bill is to require that *women workers* be treated equally with other *employees on the basis of their ability or inability to work.* . . .

123 Cong. Rec. S14,989 (1977) (remarks of Sen. Williams) (emphasis added). Repeated through the House and Senate Reports is the statement that the PDA would only require that "pregnant women be treated the same as other employees on the basis of their ability or inability to work." H. Rep. No. 95-948, 95th Cong., 2d Sess. (March 13, 1978) (Legislative History 150); S. Rep. No. 95-331 (Legislative History 41). See also H. Rep. No. 95-948, *supra,* (Legislative History 159) and S. Rep. No. 95-331, *supra,* (Legislative History 51).

CONCLUSION

While Respondent believes the decision below is correct,[6] it recognizes, of course, that this Court will be considering that question in deciding the *Newport News* case. It is therefore appropriate to hold this case pending decision

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[6]In the unlikely event that this Court should resolve the conflict between the Fourth and Ninth Circuits in favor of the position of the Fourth Circuit, this case should be remanded for further consideration by the lower courts. Two arguments, as yet unaddressed by the district court or the majority court of appeals panel, support the judgment below.

First, there is the conclusion of Judge Wright in his special concurrence that Respondent's plan did not involve discrimination or unequal treatment at all because the exclusion of pregnancy benefits for dependents affected male and female employees equally. 680 F.2d at 1248. Certainly the exclusion was facially neutral and the coverage of risks was equal. Moreover, it has never been shown, nor has Petitioner ever offered to show that Respondent's plan economically benefited female employees disproportionately.

Alternatively, the judgment below is correct because Respondent provided pregnancy benefits to spouses of male employees at the option of the employees. At all relevant times, Respondent offered at no cost to its employees a choice of health plans. All plans included dependent coverage and, only one plan excluded pregnancy coverage. Thus, Respondent provided to its employees a benefit program offering a range of options. Some health plans offered full prepaid care; others had deductibles and coinsurance payments. These plans also provided other differences in coverages, in addition to the exclusion of dependent pregnancy benefits from one of them. From all that it appears in the record, Respondent provided its employees with a package of options affording equal treatment in potential risk coverage.

in that one. Respondent, therefore, does not oppose holding the petition, but urges the Court to reverse the *Newport News* case and thereafter to deny this petition.

Respectfully submitted,

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January, 1983